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A Human Rights Triumph? Dictatorship-era Crimes and the Chilean Supreme Court

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Abstract

This article assesses the dramatic shift in Chilean Supreme Court jurisprudence toward accountability for crimes committed during the dictatorship and sets it within the context of judicial reform and political change. Chile's experience has been identified as emblematic of delayed justice, but an examination of key case law identifies the narrow scope and instability of Supreme Court decision-making. The Court has been uncharacteristically assertive in its application of human rights norms yet vulnerable to external influences. The Chilean example underscores the need for political leadership to address past violations in post-conflict societies. Political inertia impeded justice claims and, as a result, change required significant judicial innovation.

Keywords: gross human rights violations – impunity for violations – constitutional law – political transition – transitional justice – post-conflict societies – Supreme Court of Chile

1. Introduction

Chile has been the subject of significant attention by human rights scholars as one among Southern Cone countries to experience a surge in prosecutions for

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crimes committed during the authoritarian regime. Previously, the country had been studied as an example of constrained justice, illustrating the controversial compromises entailed in transitions to democracy. The efforts of the Chilean human rights community to secure the criminal responsibility of human rights abusers from the 1973–90 era contributed to the emerging field of transitional justice. But Pinochet's iconic Amnesty Law maintained a firm hold, and successive democratic governments prioritised truth processes over prosecutions. A small number of military officers were convicted in the 1990s for human rights abuses, and jurisprudential change in domestic courts prior to Pinochet's detention in London from 1998 to 2000 resulted in the indictment of others.[1] But in the immediate aftermath of the dictator's release after the UK *Pinochet* case,[2] the courts failed to realise the government's promises of local justice. More recently, a resurgence of prosecutions against former security personnel has occurred, led by private actors pursuing court processes and judges willing to convict individuals for dictatorship-era abuses. In fact, more than 20 years after the formal end of the dictatorship, court dockets are filled with past cases and hundreds of officials have been convicted for human rights abuses.[3] Renewed interest in the domestic Chilean experience has accompanied this revival. Scholars have studied Chile as a leading example of delayed accountability,[4] whereby injustices have been addressed after the democratic transition ended.[5]

These prosecutions represent a sea change. Yet efforts to explain the surge threaten to overshadow weaknesses in human rights developments in

1 Hilbink, *Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile* (New York: Cambridge University Press, 2007) at 189–202; Requa, 'The Bitter Transition', in Burbach, *The Pinochet Affair: State Terrorism and Global Justice* (London: Zed Books, 2003) at 85–9; and Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (Philadelphia: University of Pennsylvania Press, 2005) at 70–4.

2 Ibid.; Woodhouse, *The Pinochet Case: A Legal and Constitutional Analysis* (Oxford: Hart Publishing, 2000); Davis (ed.), *The Pinochet Case: Origins, Progress, and Implications* (London: Institute of Latin American Studies, 2003); Power, 'Pinochet and the Uncertain Globalization of Criminal Law' (2007) 39 *George Washington International Law Review* 89; and Moghalu, *Global Justice: The Politics of War Crimes Trials* (Westport, CT: Praeger Security International, 2006).

3 Human Rights Observatory, 'Latest Human Rights Case Statistics' (Santiago: Universidad Diego Portales, 2011), available at: http://www.icso.cl/observatorio-derechos-humanos/cifras-causas-case-statistics [last accessed 23 November 2011].

4 Arceneaux and Pion-Berlin, *Transforming Latin America: The International and Domestic Origins of Change* (Pittsburgh: University of Pittsburgh Press, 2005); Collins, *Post-Transitional Justice: Human Rights Trials in Chile and El Salvador* (University Park: Pennsylvania State University Press, 2010); Huneeus, 'Judging from a Guilty Conscience: The Chilean Judiciary's Human Rights Turn' (2009) 35 *Law & Social Inquiry* 99; and Skaar, *Judicial Independence and Human Rights in Latin America: Violations, Politics, and Prosecution* (New York: Palgrave Macmillan, 2011).

5 The transition in Chile was complete after constitutional reforms in 2005 eliminated most of the vestiges of authoritarian rule, if not before. See Collins, 'Human Rights Trials in Chile During and After the "Pinochet Years"' (2010) 4 *International Journal of Transitional Justice* 67 at 83. See also Heiss and Navia, 'You Win Some, You Lose Some: Constitutional Reforms in Chile's Transition to Democracy' (2007) 49 *Latin American Politics and Society* 163.

Chile. This article assesses decision-making by the Chilean Supreme Court, identifying its limitations and setting it in the context of judicial reform and political change. Despite individual instances in which justice has been achieved and the symbolic significance of multiple convictions, the Supreme Court's jurisprudence in key 'accountability case law'[6]—that involving human rights abuses from the authoritarian era—has been inconsistent and narrow in scope. Lower courts are left without clear guidance on issues central to human rights protection including the position of international law in the domestic system and judge-made norms. Although these courts pioneered many of the interpretive developments discussed in this article, unpredictability in Supreme Court decision-making allows for contradictory rulings as well, increasing the potential for variation in a system that does not require adherence to precedent. Changeable sentencing practices further complicate what has been characterised as a trend toward justice for past human rights violations.

Section 2 of the article examines significant cases that represent milestones in Chilean accountability jurisprudence from 1990 to 2007. It argues that Supreme Court approaches to international law, dictatorship-era law, retrospectivity and non-statutory principles are unstable. In Section 3, the case law is viewed in light of judicial reform and political developments in Chile and framed within the relevant judicial politics literature. The dramatic shift in jurisprudence, from inertia at the start of the transition to activism[7] post-transition, can be understood as the consequence of indirect international and domestic political pressure on a conservative judiciary with new-found independence. The case law does, however, demonstrate an opportunity for expansion of judicial autonomy, in conjunction with an intermittently maturing judicial culture in Chile.[8] Judge-made rules have been used inconsistently to protect rights but, once established, they can be more readily invoked by courts and human rights practitioners in other areas.

The conclusion in Section 4 considers the activity of political actors in relation to accountability trials. In short, political leaders are also responsible for instability in this area. Even as successive governments denounced the Amnesty Law on the international stage, the executive and legislature did little to facilitate judicial resolution of human rights claims by, for example,

6 'Accountability case law' is defined here as judgments involving claims of gross human rights violations related to the authoritarian period; the article's conception of accountability centres on retributive trials.

7 'Judicial activism' in this article refers to protection of internationally recognised rights and a marked distinction from the Supreme Court's traditional approach to constitutional law. See Dickson (ed.), *Judicial Activism in Common Law Supreme Courts* (Oxford: Oxford University Press, 2008); and Holland (ed.), *Judicial Activism in Comparative Perspective* (Hampshire: MacMillan, 1991).

8 On a 'new constitutional orthodoxy' in Latin America, see Couso, 'The Transformation of Constitutional Discourse and the Judicialization of Politics in Latin America', in Couso, Huneeus and Sieder (eds), *Cultures of Legality: Judicialization and Political Activism in Latin America* (Cambridge: Cambridge University Press, 2010) 158.

revoking the law or reforming the criminal code to accommodate widespread human rights violations. Prosecutions were impeded by this inertia and, as a result, jurisprudential change—tenuous as it is—required significant judicial innovation. The conclusion thus makes a contribution to recent debate in transitional justice literature on delayed justice, suggesting that ongoing political engagement on rights issues is a prerequisite for comprehensive accountability.

2. Milestones in Chilean Accountability Jurisprudence

This section identifies three main phases in Supreme Court accountability jurisprudence from 1990 to 2007. In the early years of the transition, the majority of the Supreme Court took a positivistic approach to the 1978 Amnesty Law[9] and provisions of the criminal code, key barriers to accountability. The year 1998 marks a changing point in the jurisprudence, in which the Supreme Court held that both domestic and international law required the investigation of human rights abuses covered by the Amnesty Law. In subsequent years, in the final phase, the Court developed varying creative doctrines to avoid the application of amnesty and statute of limitations rules, allowing convictions to be sustained. The judgments discussed here are notable for (i) a minimalistic use of international law during most of the post-authoritarian period, with domestic law adapted at times to incrementally align with international standards,[10] followed by the direct recognition of universal rights in recent years; (ii) the eventual identification of the authoritarian regime as illiberal but continued reliance by the Supreme Court on dictatorship-era law, including inconsistent treatment of the Amnesty Law; (iii) tension in regard to the retrospectivity of human rights standards; and (iv) use of judge-made law to support changes in the interpretation of constitutional and international law. Significantly, decision-making in these cases—resulting in accountability for human rights violations—is exceptional when compared to results in cases dealing with contemporary rights issues.[11]

9 Decree Law No 2.191 (18 April 1978). Article 1 provides: 'Amnesty shall be granted to all individuals who committed criminal acts, whether as perpetrators, accomplices or accessories after the fact, during the state of siege in force from September 11, 1973 to March 10, 1978, provided they are not currently subject to legal proceedings or have been already sentenced.' [Author's translation]

10 This trend has been identified in the UK context as well in relation to Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, 213 UNTS 221, in UK courts, see Requa and Anthony, 'Coroners, Controversial Deaths, and Northern Ireland's Past Conflict' (2008) *Public Law* 443. In the context of obligations of European Union membership, also in UK courts, see Allison, 'Parliamentary Sovereignty, Europe and the Economy of the Common Law', in Andenas and Fairgrieve (eds), *Liber Amicorum in Honour of Lord Slynn of Hadley Volume II: Judicial Review in International Perspective* (The Hague: Kluwer Law International, 2000).

11 Couso, 'The Judicialization of Chilean Politics: The Rights Revolution That Never Was', in Sieder, Schjolden and Angell (eds), *The Judicialization of Politics in Latin America* (New York: Palgrave MacMillan, 2005) 114.

A. Phase I (1990–97): Vestiges of Authoritarianism

The 1990 Supreme Court decision in *Insunza Bascuñán*[12] set the tone for the first phase of accountability jurisprudence during the post-dictatorship era. In joined cases, representing 70 disappearances, the petitioners challenged the constitutionality of the application of the Amnesty Law by a military tribunal. Rejecting the petition, the Supreme Court held that constitutional provisions allowing for amnesty prevailed over criminal codes that required investigations to be completed before a case could be closed.[13] Article 44 of the 1925 Chilean Constitution, still in place at the time the Amnesty Law was decreed, and Article 60(16) of the dictatorship's 1980 Constitution, both provided the state with legislative power to declare amnesty.[14] The Court elevated the Amnesty Law over other constitutional norms in place at the time of the decision. Article 5(2), providing first that the sovereignty of the state was limited by rights emanating from human nature and second that organs of the state have the duty to respect and promote those rights guaranteed by the Constitution and by international treaties ratified by Chile,[15] and Article 73, regarding judicial authority (which included making determinations of criminal culpability), did not disturb an amnesty law promulgated under the powers of Article 60.[16] The applicants had invoked common Article 3 of the Geneva Conventions[17] providing for fundamental protection of persons taking no part or no longer an active part in hostilities in non-international armed conflicts.[18] The Supreme Court held common Article 3 to be inapplicable because the Court did not consider the period following the coup to be one of an internal armed conflict. The International Covenant on Civil and Political Rights (ICCPR)[19] was not ratified until 1989, so rules against retrospectivity of law prevented its application to cases originating in the 1970s.[20] According to the Court, the declaration of amnesty is a use of legislative power which suspends a declaration of criminality—essentially extinguishing the criminal

12 *Iván Sergio Insunza Bascuñán*, Corte Suprema de Justicia ('Supreme Court'), Case No 27.640 (24 August 1990); LXXXVII *Revista de Derecho y Jurisprudencia* [Journal of Law and Justice] Part 2, Section 4, 64 (1990). The case was affirmed on 28 September 1990.

13 Ibid. at paras 22–3.

14 Ibid. at paras 19–20. See Contreras, 'La Amnistía en la Constitución' [Amnesty in the Constitution] (1991) 18 *Revista Chilena de Derecho* [Chilean Journal of Law] 101 at 101–2.

15 The second part of this provision was included after 1989 reforms to the 1980 Constitution; the distinction is discussed further below. Article 5(2) of the Constitución Política de la República de Chile de 1980 [1980 Constitution of the Republic of Chile] ('1980 Constitution') (modified by Section 1, Law No 18.825 (17 August 1989)).

16 *Insunza Bascuñán*, supra n 12 at paras 22–3.

17 Third Geneva Convention relative to the Treatment of Prisoners of War 1949, 75 UNTS 135; and Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War 1949, 75 UNTS 287.

18 See further Fleck, 'The Law of Non-International Armed Conflicts', in Fleck (ed.), *The Handbook of International Humanitarian Law* (Oxford: Oxford University Press, 2008) ch 12.

19 1966, 999 UNTS 171.

20 *Insunza Bascuñán*, supra n 12 at paras 26 and 28.

character of an act. By implication, the Court considered the junta to be a legislative power. *Insunza Bascuñán* essentially forestalled civil remedies as well;[21] although the Court allowed that victims could pursue civil avenues, with no official investigation to determine culpability such an action would fail. The possibility of civil compensation was 'not only illusory but juridically impossible' given the Supreme Court's interpretation of the Amnesty Law's effect.[22]

B. Phase II (1998): The Turning Point

Lower appellate courts intermittently diverged from the Supreme Court analysis throughout the 1990s,[23] but for many years the Supreme Court itself did not deviate from finding the Amnesty Law constitutional. A clear indication of jurisprudential change was not apparent until 1998,[24] reflecting judicial reform and ideological shifts in the Court.[25] The series of accountability cases decided in 1998 represent the second phase of post-dictatorship Supreme Court jurisprudence on the Amnesty Law. Cases in that year demonstrate volatility in what had been settled analysis and, ultimately, the Court held that application of the Amnesty Law was unlawful and international law had supremacy in the constitutional system.[26] Findings in *Poblete Córdova* eventually became established doctrine in disappearance cases and the bedrock upon which accountability jurisprudence was further developed—the case represents a turning point, after which courts increasingly advanced rights protection.[27]

The first of the Phase II cases, *Uribe Tambley*,[28] revealed fissures in the Phase I doctrine. The split decision (3:3, held in favour of the accused because of this

21 Norris, 'Leyes de Impunidad y los Derechos Humanos en Las Américas: Una Respuesta Legal' ['Impunity Laws and Human Rights in the Americas: A Legal Response'] (1992) 15 *Revista IIDH* [*Journal Interamerican Institute for Human Rights*] 47 at 55–6.

22 Case 10.843, *Garay Hermosilla et al. v Chile* Report No 36/96 (1996); 5 IHRR 816 (1997) at para 9.

23 Hilbink, supra n 1 at 195–8.

24 There are a few exceptions to this general trend, including a 4 September 1995 decision by the Supreme Court allowing state agents to be questioned in relation to a disappearance (*María Eugenia Martínez Hernández*) and the 5 December 1995 confirmation of convictions in a disappearance case (*Juan Chequepan y Jose Llaulen*). See Amnesty International, 'Chile: Transition at the Crossroads; Human Rights Violations under Pinochet Rule Remain the Crux', 6 March 1996, AI Index: AMR 22/001/1996 at 27, available at: http://www.amnesty.org/en/library/info/AMR22/001/1996 [last accessed 23 November 2011].

25 These changes are discussed further in Section 3.

26 *Poblete Córdova*, Supreme Court, Case No 469-98 (9 September 1998).

27 Under an informal judicial rule, Supreme Court doctrine should be followed by lower courts after two or three rulings. But the Supreme Court has said that its decisions are not binding on subsequent decisions. Valenzuela, 'Suprema dice que sentencias del pleno no son obligatorias' ['Supreme Court states that plenary decisions are not obligatory'], *El Mercurio*, 15 March 2008.

28 *Bárbara Uribe Tambley y Edwin Francisco Van Yurick Altamirano*, Supreme Court, Case No 973-97 (19 August 1998).

division) rejected an appeal against the permanent suspension of a case by a military tribunal through application of the Amnesty Law. The case focused on two disappearances in 1974.[29] The lead opinion found that the Amnesty Law negated all effects of criminal action that had taken place and that such legislation is permissible under domestic law for the sake of 'social tranquillity'.[30] The opinion legitimised not only the laws of the junta but also arguments it used to justify the law, finding that the declaration of a state of siege[31] was a preventative method intended to avoid a state of war.[32] The dissenting opinion accepted that the Geneva Conventions, as international treaty law ratified by Chile in 1950, had primacy in constitutional terms over the Amnesty Law and that the investigation into the facts of the disappearances should have been completed. Two key arguments were made. First, the domestic penal code, which allowed for criminal responsibility to be extinguished in certain circumstances, and the Amnesty Law itself required identification of a responsible person. It was only possible to extinguish punishment, accordingly, if such a determination had been made.[33] Secondly, under Article 5 of the Chilean Constitution, international treaties had pre-eminence over domestic law, including constitutional law.[34] The dissenters did not specify whether they considered the Conventions, which obligate state parties to provide effective penal sanctions for grave breaches and bring those accused of such crimes before courts,[35] to require more than the establishment of the circumstances surrounding disappearances.[36]

Many of the minority arguments in *Uribe Tambley* were echoed in the lead opinion of *Poblete Córdova*,[37] a 5:1 decision reflecting a new composition of the Supreme Court.[38] This was the first to reinstate for investigation a disappearance case that had been dismissed by a military tribunal's application of amnesty. The Court's holding that domestic law required an investigation to determine individual responsibility[39] would have been sufficient to decide the case. Yet, a majority of the Court also found for the first time that international

29 The disappearances had been the subject of an additional legal proceeding, closed by the Supreme Court in 1995.
30 *Uribe Tambley*, supra n 28 at para 5 (lead opinion).
31 Decree Law No 3 (1973). The period was characterized as a state of war in Decree Law No 5 (1973).
32 *Uribe Tambley*, supra n 28 at paras 7–8 (lead opinion).
33 Ibid. at paras 1–6 (dissent).
34 Ibid. at para 10 (dissent).
35 For example, Articles 129–131 Third Geneva Convention 1949; and Articles 146–148 Fourth Geneva Convention.
36 *Uribe Tambley*, supra n 28 at para 10 (dissent). See also *Paredes Barrientos*, Supreme Court, Case No 28–97 (20 August 1998).
37 *Poblete Córdova*, supra n 26.
38 Discussed further in Section 3.
39 *Poblete Córdova*, supra n 26 at paras 6–8 (majority).

law in effect at the time of the disappearance—here, the Geneva Conventions—had hierarchical superiority within the national legal order and required investigation prior to application of the Amnesty Law.[40] The Court did not distinguish between the Constitution's limitation on state sovereignty based on 'rights emanating from human nature' (the first part of Article 5(2)) and the state's duty to respect rights guaranteed by international treaties[41] (the second part of the provision, modified in 1989[42]). The Court's approach—to investigate crimes before applying amnesty—did not explicitly go beyond 'the Aylwin Doctrine' expressed seven years earlier by President Patricio Aylwin. (He had promoted the principle that courts should investigate cases to the point where the circumstances of the crime were known and criminal responsibility established.[43]) As with other second-phase cases, the progressive judges on the Court indicated that the state's obligations to provide sanctions under the Geneva Conventions might be satisfied solely by investigating the facts prior to application of the Amnesty Law.[44] The majority did, however, consider that the offence might fall outside the fixed dates of the Amnesty Law, given that the whereabouts of the victim continued to be unknown.[45] The latter argument had been upheld previously by the Santiago Court of Appeal and was further developed in subsequent case law.

The Court demonstrated a preference for founding decisions in domestic, rather than international, law during Phase II. In a 4:2 judgment issued shortly after *Poblete Córdova*, the case of *Contreras Maluje*,[46] the Court allowed an appeal against a military court decision to dismiss a disappearance case, because new information had arisen through investigations undertaken by the National Corporation for Reparation and Reconciliation. The Court found an error in the application of domestic criminal law. Accordingly, it did not analyse arguments founded in constitutional and international law.[47] Similarly, in *Barrios Duque*[48] the Supreme Court relied on domestic law to annul a high military court decision dismissing the case.[49] The facts had been the subject of two proceedings raised in regular courts and transferred to military jurisdiction; the Amnesty Law had been applied in the first case, and the military

40 Ibid. at paras 9–10 (majority) (citing common Article 3 and Articles 146 and 147; and Fourth Geneva Convention, supra n 17).
41 *Poblete Córdova,* supra n 26 at paras 9-10 (majority).
42 See supra n 15.
43 Upon presenting the findings of the Commission on Truth and Reconciliation in a televised address on 4 March 1991, President Aylwin expressed hope that courts would carry out exhaustive investigations of human rights abuses 'to which in my view, the 1978 Amnesty Law is no obstacle'. See Amnesty International, supra n 24 at 17.
44 *Poblete Córdova,* supra n 26 at para 10 (majority).
45 Ibid. at para 11 (majority).
46 Supreme Court, Case No 292-97 (26 October 1998).
47 Ibid. at para 7 (majority).
48 *Barrios Duque,* Supreme Court, Case No 2.097-98 (29 December 1998).
49 Ibid. at para 14 (majority).

court dismissed the second because the issues had been previously adjudicated[50] ('*res judicata*'[51]). The Court found this to be in error. After an analysis of the criminal procedure code and domestic law principles, it held that the doctrine of *res judicata* in criminal matters requires common identity between the subjects of the proceedings. In the first case, no individual had been processed and, therefore, the *res judicata* argument failed.[52]

Throughout Phase II, the progressive opinions (that is, those, whether majority or dissenting, asserting that accountability cases should be reopened) relied to an extent on dictatorship-era law and declined to challenge its validity. Judges did not reject the Amnesty Law outright, treating it as an effective legal article. In *Poblete Córdova*, for example, the constitutionality of the Amnesty Law was not put into doubt even when the Court recognised arguments that evaded the law. When judges held that common Article 3 of the Geneva Conventions was triggered, they invoked military decrees issued shortly after the coup to support the claim that an internal armed conflict existed when the crime took place.[53] At the end of Phase II, a critical stage in accountability jurisprudence and rights protection had been reached, but there was minimal substantive change in Supreme Court decision-making. *Poblete Córdova* was significant from a symbolic perspective (and in terms of its effect in that case). Significantly, it was decided before Pinochet's detention in London in October 1998. But it did not necessarily require more than identification of those responsible for human rights abuses. As a result, the wider impact of the jurisprudence on lower courts was not immediately clear.

C. Phase III (1999–2007): A (Narrowly Defined) Rights Revolution

In Phase III, the Court consolidated protection of rights related to abuses from the authoritarian era and significantly developed constitutional jurisprudence on international law. Fundamental domestic law in effect and/or promulgated during the dictatorship, including most significantly the 1980 Constitution and criminal law rules and principles, generally continued to be applied without assessment of its legality. But legislation deemed political in nature – the Amnesty Law and certain military decrees – was increasingly identified as invalid. In effect, the four cases discussed here[54] demonstrate a sea change in Supreme Court jurisprudence.

50 Ibid. at paras 2 and 5 (majority).
51 The doctrine of *res judicata* prevents an adjudicated issue from being the subject of a subsequent proceeding.
52 *Barrios Duque*, supra n 48 at paras 11 and 13.
53 See *Uribe Tambley, Paredes Barrientos* and *Poblete Córdova*.
54 *Miguel Ángel Sandoval*, Supreme Court, Case No 517-04 (17 November 2004), 394 *International Law in Domestic Courts* database (CL 2004); *Diana Frida Arón Svigilsky*, Supreme Court, Case

In *Sandoval*, two military officers appealed sentences issued by the Santiago Court of Appeal against them as principal and accomplice in a disappearance case. The Supreme Court upheld the convictions unanimously, supporting the Court of Appeal's determination that the disappearance constituted the crime of kidnapping under domestic law. Since it was not possible to determine when the offence came to an end, the Amnesty Law and statutes of limitations rules did not apply.[55] On appeal, the applicants challenged the Court of Appeal's reliance on international treaties which were not in force at the time of the initial detention.[56] The Supreme Court dismissed this and other arguments, finding that the lower court decision was based on domestic law that was only 'illustrated' by the terms of international treaties.[57] In a discussion of the content of international human rights, the Court emphasised individual freedom and recognised the 'just and legitimate right to know the whereabouts of those who have been detained'.[58] The crime of kidnapping corresponded with offences found in the Inter-American Convention on the Forced Disappearance of Persons 1994.[59] Thus, the Supreme Court illustrated *its* decision with international law that had not been ratified by Chile at the time of the judgment.[60] Notably, the Supreme Court dismissed the applicants' arguments that their crime was illegal detention rather than kidnapping,[61] revealing an ideological view about the authoritarian government. Whereas illegal detention would imply the functionary was acting in congruence with a regular system of procedure, albeit going beyond those boundaries, the Court asserted that there was no provision for the authorities 'to detain people and take them to clandestine detention centres, and even less to apply torture'.[62] There was no indication that the victim had committed a crime, no appearance before a tribunal and no relevant judicial or administrative order for the detention.[63] Thus, the applicants' attempt to frame their conduct in legal terms was rejected. The Court presented a stronger argument than it had previously that the military's activities were unlawful, yet it still did not reject the Amnesty Law outright.

No 3.215-05 (30 May 2006); *Villa Grimaldi (Re Pinochet)*, Supreme Court, Case No 2.707-06 (3 October 2006); and *Manuel Tomás Rojas Fuentes*, Case No 3.125-04 (13 March 2007), 1093 *International Law in Domestic Courts* database (CL 2007).

55 See, for example, *Sandoval*, supra n 54 at paras 27, 30 and 36–9. This approach, which considers disappearances to continue unless unresolved is referred to here as the 'ongoing crime doctrine'.

56 Ibid. at paras 1, 9 and 10.

57 Ibid. at para 18.

58 Ibid.

59 Ibid. at para 32.

60 The Inter-American Convention on the Forced Disappearance of Persons (1994) 33 ILM 1529, was signed by Chile in 1994 and entered into force in 1996, but was not ratified by Chile until 2010.

61 *Sandoval*, supra n 54 at paras 19–24.

62 Ibid. at para 24.

63 Ibid. at para 20.

Arón took a more expansive approach to rights protection than *Sandoval*, not only solidifying the ongoing crime doctrine but also finding that Article 5 of the Constitution was violated. The latter holding laid a foundation for subsequent convictions even when killings or torture had taken place within the time of the Amnesty Law. In *Arón*, the Santiago Court of Appeal had applied the Amnesty Law after the first instance court had convicted the defendants, a reminder that fifteen years into the transition, not all courts evaded the law.[64] In its unanimous decision, the Supreme Court revoked the amnesty application.[65] First, the Court held that the crime of kidnapping is of a permanent character when there is no evidence the victim was liberated or suffered another consequence.[66] Secondly, the Court found that, under Article 5, domestic laws relating to statutes of limitations and amnesty must adhere to constitutional limitations and international obligations.[67] The crime was of an international character and rights to effective remedies under the American Convention on Human Rights (ACHR)[68] and the ICCPR[69] prohibited amnesty for such crimes; in consequence Article 5(2) was breached.[70] By applying the Amnesty Law, the Court of Appeal had committed an error of law.[71] The Supreme Court used a conflict of law analysis (identifying tension between rights favouring victims and those protecting the accused) to hold that the ACHR was applicable to the case despite ratification in 1990. 'In a conflict of this character, [courts] should favour the norms that best protect human rights; this is the . . . spirit emanating from the Constitution.'[72] In this case, the Court recognised rights to truth and justice which overshadowed the doctrine against retroactive application of law adverse to defendants.[73]

The 2006 *Villa Grimaldi* case, in which the Supreme Court (8:4) affirmed a Court of Appeal decision lifting Pinochet's immunity to be investigated for the alleged torture of several people in a secret detention centre, relied on a similar conception of the constitutional framework. The majority determined that the Chilean state generally and the courts in particular have an obligation to

64 The lead opinion in the Court of Appeal was written by a judge appointed during the dictatorship.
65 *Arón*, supra n 54 at s IV.
66 Ibid. at s II, para 2.
67 Ibid. at s II, paras 3–4. The Court cited a 1995 company law case (*Chilena de Fósforos S.A. v La Comisión Nacional de Distorsiones de Precios de las Mercaderías de Importación*, Supreme Court, Case No 3396-94 (1995)) to support its analysis that, once incorporated into domestic law, international treaties must be complied with in good faith under Articles 27 and 31 of the Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331, and that international treaties have precedent over domestic law unless denounced by the Chilean state or no longer internationally valid.
68 1969, 1144 UNTS 123, see Article 25.
69 See Article 2(3) ICCPR. The Court also referred to Article 15(2) ICCPR.
70 *Arón*, supra n 54 at s II, paras 4 and 5.
71 Ibid. at s II, para 5 (referring, in addition to Article 5, to Article 6, requiring bodies of the state to act in conformity with the Constitution).
72 Ibid.
73 Ibid.

guarantee public security in times of war, including a duty to investigate and punish those who commit international crimes, and this duty existed during the authoritarian regime.[74] Article 5 provided the primary basis for the supremacy of international responsibilities[75] supported by other constitutional principles and values, such as freedom of all persons and the state's duties to ensure security and promote the common welfare.[76] According to the Court, the history of Article 5 clearly established that core values are superior to any norms promulgated by the state. The 'supraconstitutional construction' is valid not because these values are found in international instruments but because they refer to fundamental rights.[77] Conflict between internal and international law should be resolved in favour of that which most protects human rights. The Court concluded that use of the Amnesty Law and statutes of limitations must be rejected.[78]

The pool of international authorities deemed applicable to *Villa Grimaldi* was particularly wide and, given that each authority pre-dated the relevant incidents, allowed the Court to side-step the issue of retrospectivity. The Court again held that common Article 3 of the Geneva Conventions and Articles 146 and 147 of the Fourth Geneva Convention required the state to guarantee security during periods of internal armed conflict and bring those accused of grave violations before domestic courts.[79] This analysis, now internationally accepted,[80] had been contested in domestic courts throughout Latin America in the 1990s.[81] The prohibition of amnesty for grave violations of international humanitarian law was implicit in the Court's analysis. According to the Court, principles such as these have become, moreover, *jus cogens*,[82] which 'all the courts in all the world' are obligated to apply.[83] Chile's membership of the United Nations and historic support for international humanitarian law and human rights law provided further justification for the Court's conclusions.[84]

74 *Villa Grimaldi*, supra n 54 at paras 8–10.
75 Ibid. at para 13.
76 Ibid. at para 11 (citing a Constitutional Tribunal decision, Case No 21 (21 December 1987), at paras 19–21). The Constitutional Tribunal made reference to, *inter alia*, Articles 1, 4, 5 and 19 of the 1980 Constitution.
77 *Villa Grimaldi*, supra n 54 at para 13. The Court cited as authority Constitutional Tribunal decisions, a 1996 Supreme Court judgment and expert opinions from sessions of the 1974 constitutional commission.
78 Ibid. at para 13 (citing nineteenth century lawyer and philosopher Andrés Bello).
79 Ibid. at para 8.
80 Wolfrum and Fleck, 'Enforcement of International Humanitarian Law' in Fleck, supra n 18. On divisions and synergy between international humanitarian law and human rights law, see Arnold and Quenivet (eds) *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Leiden: Martinus Nijhoff Publishers, 2008).
81 Roht-Arriaza and Gibson, 'The Developing Jurisprudence on Amnesty' (1998) 20 *Human Rights Quarterly* 843.
82 *Jus cogens* are fundamental principles of law recognised by the international community as non-derogable.
83 *Villa Grimaldi*, supra n 54 at para 13.
84 Ibid. at paras 9 and 12.

The Court even considered that a 1973 UN General Assembly resolution governing principles of international cooperation in the punishment of persons culpable of war crimes and crimes against humanity was relevant to the result.[85] International instruments stemming from executive agreement with outside bodies must be complied with,[86] and states should of course conform to treaties in accordance with the Vienna Convention on the Law of Treaties,[87] requiring good faith observation of those instruments that have not been renounced.[88] Extensive citation of international judgments, including those by the Inter-American Court of Human Rights,[89] also marked a distinction from Phase II jurisprudence, as did the natural law arguments that pervaded the decision.

The final development in Phase III case law is apparent in the *Tomás Rojas* case;[90] despite the execution of the victim during the period of the Amnesty Law, the Supreme Court overturned an appellate decision to dismiss the case.[91] The Court's approach to constitutional law was not substantially different from that apparent in *Villa Grimaldi*. Instead, the case is striking for its analysis of the political context and identification of legal illiberalism during the dictatorship, an analysis with resonance beyond the legal realm.

The applicants had sought to reopen the case in part so that culpability by superior military officers could be investigated; the victim had been killed within a military camp in circumstances in which many were involved but only one officer had been found responsible.[92] The Court considered that grave violations of the victim's essential rights had occurred, which could be considered crimes against humanity.[93] It held that Articles 146 to 148 of the Fourth Geneva Convention require not only investigation of such abuses, but processing of offenders and the establishment of penal sanctions, and that amnesty is inapplicable in relation to these crimes while the Conventions have domestic effect.[94] In addition to relying heavily on the Geneva Conventions, the case also avoided the principle of non-retrospectivity of criminal law by finding that *jus cogens* principles recognised at the time of the victim's death also formed an integrated part of Chilean law via Article 5(2).[95] In effect, the

85 Ibid. at para 9 (referring to GA Res 3074 (XXVIII), 3 December 1973, A/RES/3074 (XXVIII)).
86 Ibid. at para 12.
87 Supra n 67. See, for example, Article 27.
88 *Villa Grimaldi*, supra n 54 at paras 7–8 and 12.
89 For example, *Velásquez Rodríguez v Honduras* IACtHR Series C 4 (1988); and *Barrios Altos v Peru* IACtHR Series C 75 (2001); 10 IHRR 487 (2003).
90 *Tomás Rojas*, supra n 54.
91 Two judges concurred in the result to re-open the investigation but still would have applied the Amnesty Law upon completion of the investigation.
92 *Tomás Rojas*, supra n 54 at paras 2(1) and 3(2).
93 Ibid. at para 26.
94 Ibid. at paras 16(2)-17 and 25.
95 Ibid. at para 31.

Court held that both international treaty law and customary international law aligned to prohibit violation of 'rights emanating from human nature'.

Tomás Rojas was therefore consistent with other Phase III cases in finding that core international principles have constitutional pre-eminence over internal law.[96] The judgment traced the foundation for Article 5(2) in recent constitutional history (international law constituted a limitation on sovereignty under the 1925 Constitution as well)[97] and held that international instruments related to essential rights have a higher constitutional rank than other treaties.[98] The Court noted that even a 1973 pronouncement by the authoritarian Chilean government recognised the duty of courts to apply international law.[99] In the event of conflict between international and domestic law, courts should assume that legislators did not intend to infringe international principles and interpret domestic law accordingly.[100] The Court made an even stronger natural law argument than it had in *Villa Grimaldi*, quoting with approval the proposition that the liberty of states to determine laws within their territories cannot infringe a 'certain nucleus of law in the conscience of all civilised societies'.[101]

The most salient aspect of the *Tomás Rojas* judgment is its assessment of the illegality of certain dictatorship-era laws and recognition that ordinary courts had failed to protect rights. The Court found that the military junta destroyed the constitutional government of the time and established military jurisdiction,[102] accompanied by severe repression.[103] The killing at issue in the case took place in the context of systematic violations of human rights by state agents; the person killed was a victim of a general policy to exile, detain, persecute or execute citizens for ideological reasons or because they were suspected of impeding the political goals of the junta.[104] Conduct was actively concealed from the ordinary courts.[105] The peculiarity of the situation compelled the Supreme Court of the time 'to inhibit its intervention' such that the autonomy of military jurisdiction was maintained and oversight was located with the military general in charge.[106] In this context, those who benefited from the state of war designation were bound by international humanitarian law and

96 Ibid. at paras 23, 31 and 35.
97 Ibid. at para 38.
98 Ibid. at para 39 (finding that the obligation to protect human rights is rooted not only in Article 5 but also Articles 1 and 19, as well as international instruments).
99 Ibid. at para 36(4) (referring to a statement in an asylum case by an official of the Ministry of External Relations).
100 Ibid. at para 36(3).
101 Ibid. at para 37 (citing Maurach and Zipf, *Derecho Penal* [*Criminal Law*], Bofill and Aimone trans., 7th German edn (Editorial Astrea, 1994)).
102 Ibid. at para 6 (citing Decree Law Nos 3, 5, 640 and 641).
103 Ibid. at para 26(2).
104 Ibid.
105 Ibid.
106 Ibid. at para 8(2) (citing 1974 Supreme Court rulings).

could not evade sanctions for transgressing them.[107] Moreover, no state could initiate procedures that were not subject to law or morality.[108] Human rights principles prohibited the use of amnesty for war crimes[109] and self-exoneration of criminal responsibility by perpetrators of grave violations.[110] The Court identified it as a 'tragedy' when the state uses law in an attempt to certify the legality of immoral acts.[111]

A candid account of the establishment and conduct of the authoritarian government had been routine in international tribunals during the Chilean transition. For example, the unvarying approach of both the Inter-American Commission and Inter-American Court was to consider not only the Amnesty Law, but also the 1980 Constitution and other laws put into effect by the dictatorship, as invalid. The 1925 Constitution provided that laws not promulgated by democratic means were null and void. The failure of the post-authoritarian Chilean state to amend domestic law in accordance with relevant standards and to investigate and prosecute human rights abuses provided the basis for breaches of international law.[112] In *Tomás Rojas*, the criminal chamber of the Supreme Court echoed this analysis. More generally a significant shift in Supreme Court jurisprudence is demonstrated by the Phase III doctrine on the primacy of international law, rooted not only in Article 5(2) of the 1980 Constitution but also in state obligations to protect essential rights found in past constitutions and natural law.

D. Contradictory Decision-making

The broader picture of adherence to international standards in accountability case law is more ambiguous. First, the Supreme Court deviated from these jurisprudential trends in individual cases through at least January 2010.[113] In an isolated case in 2009, for example, the criminal chamber of the Court found that domestic statute of limitations rules prevented prosecution of a

107 Ibid. at para 13.
108 Ibid. at para 15.
109 As with other Phase III judgments, the Court considered that Article 6(5) of Additional Protocol II to the Geneva Conventions relating to the Victims of Non-International Armed Conflicts 1977, 1125 UNTS 609 (requiring authorities, at the end of hostilities, to endeavour to grant the 'broadest possible amnesty' to persons who have participated in an internal armed conflict) did not contemplate self-amnesty for violations of international crimes. See *Tomás Rojas*, supra n 54 at para 21(3).
110 Ibid. at paras 21(3) and 24–25.
111 Ibid. at para 37 (citing Maurach and Zipf, supra n 101).
112 *Hermosilla v Chile*, supra n 22; Cases 11.228, 11.229, 11.231 and 11.182, *Meneses Reyes et al. v Chile* Report No 34/96 (1996); Case 11.725, *Carmelo Soria Espinoza v Chile* Report No 133/99 (1999); and *Almonacid-Arellano et al. v Chile* IACtHR Series C 154 (2006).
113 See, for example, a discussion of the use of statutes of limitations in human rights cases in Human Rights Observatory, *Bulletin No 8: Human Rights Trials in Chile and the Region* (Santiago: Universidad Diego Portales, July 2010) at 6, available at: http://www.icso.cl/images/Paperss/bulletin.%208.pdf [last accessed 23 November 2011].

disappearance case.[114] Moreover, in recent years, the Court has routinely applied a partial statutes of limitations formula to reduce sentences of dictatorship-era human rights violators, resulting in minimal or conditional sentences for many defendants.[115] The decisions are based on a general provision of the Penal Code that requires judges to consider duration of time since the offence as a mitigating factor in sentencing, even where the statute of limitations has not been reached.[116] But they are at variance with findings in Phase III jurisprudence that statutes of limitations should not apply in cases of gross human rights abuses. The Court's calculations also have been inconsistent as to when statutes of limitations begin to run in disappearance cases.[117] The approach to sentencing differs by judge rather than being established through a particular political compromise. Another obstacle to redress for victims of gross human rights abuses is the use of statutes of limitations rules to close civil actions. The civil law chamber of the Court has found, *inter alia,* that the Geneva Conventions refer exclusively to criminal law and only provide the basis for not applying statutes of limitations in criminal cases.[118] These decisions, as well as delays in long-standing cases, temper the significance of the developments identified in the previous section. Although the overwhelming trend of the Supreme Court's criminal chamber was toward protection of rights and in consequence there was general uniformity amongst lower courts, lack of precedent allowed for divergence, underscoring 'the fragility of the Supreme Court jurisprudence'.[119]

A second argument can be made that the Supreme Court's doctrine on the pre-eminence of international law, which could be a key legacy of accountability case law applicable in other rights cases, is tenuous. In particular, questions remain regarding whether or to what extent hierarchy of law differs depending on the rights involved. Phase II cases increasingly had found international treaties superior to domestic law through reliance on the second part of Article 5(2), added in 1989, which recognises international law ratified by Chile as a limitation on state sovereignty. The impact of these cases was tempered by the Supreme Court's findings that only the few treaties ratified at the

114 *Carmen Binfa Contreras*, Supreme Court, Case No 4329-08 (22 January 2009) at paras 4–11 (cited in *Informe Anual sobre Derechos Humanos en Chile 2009* [*Annual Report of Human Rights in Chile 2009*] 40 (Santiago: Centre of Human Rights, Ediciones Universidad Diego Portales, 2009)). See also *Annual Report of Human Rights in Chile 2008* 472 (Santiago: Centre of Human Rights, Ediciones Universidad Diego Portales, 2008).

115 Human Rights Observatory, *Bulletin No 10: Human Rights Trials in Chile and the Region* (Santiago: Universidad Diego Portales, 2010); and Human Rights Observatory, *Bulletin No. 11: Human Rights Trials in Chile and the Region* (Santiago: Universidad Diego Portales, 2011), available at: http://www.icso.cl/observatorio-derechos-humanos/publicaciones-y-actividades/ [last accessed 23 November 2011]. See also *Annual Report of Human Rights in Chile 2009*, ibid. at 39.

116 Ibid. (citing Article 103 of the Chilean Penal Code).

117 Ibid. at 41–2.

118 Ibid. at 36.

119 Ibid. at 40.

time of a disappearance could be applied in each case and the narrow interpretation of the obligation to provide penal sanctions under the Geneva Conventions. Still, Phase II cases created the potential for further development of the doctrine in contemporary cases. In *Sandoval*, a broader base of international law was invoked to support a decision founded in domestic law. The case provides an example of domestic law being adapted to conform to international standards without identification of that law as binding, a trend observed in other contexts[120] which also raised the potential for future expansion of rights protection. Other Phase III cases moved beyond incremental adherence to international norms and directly applied a wide spectrum of international law and other sources. Their findings were not dependent on treaty ratification; instead, the Supreme Court held that fundamental human rights are superior to both international treaties and domestic law. The Court invoked the spirit of the Constitution, constitutional history, and other state obligations to support its view. But the Article 5(2) analysis was closely linked with the determination that *jus cogens* had been violated. It is quite likely that the Court's approach would be different in respect to derogable rights. In addition, the decisions turned on the severe and systematic conduct of the military. The doctrine is vulnerable to being distinguished in future cases where, for example, the general social environment is not considered to be repressive.

In sum, at the end of Phase III, Amnesty Law doctrine was generally uniform but the possibility of contradictory rulings remained. Despite the innovative nature of the Supreme Court's accountability jurisprudence, lower courts were left without clear guidance on the appropriate use of judicial discretion and the primacy of different forms of international law in rights cases. (Lower courts apply Supreme Court doctrine regarding hierarchy of law and the role of the judiciary, even if they are not bound to follow applications of law in individual cases.) Clarity regarding these fundamental principles could have facilitated the development of rights jurisprudence more generally. In addition, the context-specific decision-making in Phase III case law limited its applicability in other cases.

3. Explaining Jurisprudential Change in Accountability Case Law

Notwithstanding the weaknesses mentioned above, the jurisprudential shift—from loyalty to the authoritarian regime to a fierce defence of international rights—is striking for taking place in the post-dictatorship era without legislative change to the Amnesty Law. Between 1990 and 2007, the Chilean

120 See supra n 10 and accompanying text.

Supreme Court moved from upholding the law at the onset of an investigation, without assessing its lawfulness or the validity of claims, to tentative evasion of the law and eventual rejection of it. The most salient explanation for the change was constitutional reform of the Supreme Court in late 1997, although the resulting modification to the composition of the Court does not wholly account for the timing and degree of Phase III developments. This section first summarises judicial reform during the period,[121] which partially explains the shift from Phase I to Phase II case law. It then considers explanations for change in judicial politics literature and outlines a number of political factors that resulted in the conservative Supreme Court expanding rights protection in these cases. Finally, it is argued that the jurisprudence is an indicator of the surprisingly significant role that judicial autonomy plays in the Chilean legal system.

A. Judicial Reform

Prior to the democratic transition, Pinochet attempted to ensure a long-lasting judiciary supportive of the military regime by appointing a younger cohort of Supreme Court justices. To this end, he enacted legislation in 1989 providing financial encouragement for Supreme Court justices over the age of 75 years to retire[122] and appointed seven new justices out of a total of 17 before leaving office in 1990,[123] taken from a list of candidates proposed by the Court as required by the Constitution.[124] Attempts at judicial reform in the early years of the transition were largely unsuccessful,[125] except that legislation taking effect in 1995 divided the Court into separate chambers that allowed human rights cases to be heard in a particular penal chamber.[126] The most significant development relevant to the issues covered here was a modification of the appointment process by constitutional amendment in 1997 which, *inter alia*, (i) provided that the Supreme Court be composed of 21 justices; (ii) required agreement by the Senate to each appointment; (iii) mandated that at least five members of the Court should be lawyers outside of the judiciary; and (iv)

121 The significant issue of ongoing military jurisdiction over matters involving the military and police is beyond the scope of this article. See Pereira and Zaverucha, 'The Neglected Stepchild: Military Justice and Democratic Transition in Chile' (2005) 32 *Social Justice* 115.

122 Decree Law No 18.805 (17 June 1989).

123 Hilbink, supra n 1 at 159.

124 Article 75, 1980 Constitution.

125 Hilbink, supra n 1 at 182–3 and 185; and Barahona de Brito, *Human Rights and Democratization in Latin America* (Oxford: Oxford University Press, 1997) at 175. See also Fuenzalida Faivovich, 'Law and Legal Culture in Chile, 1974-1999', in Friedman and Pérez-Perdomo (eds), *Legal Culture in the Age of Globalization* (Stanford: Stanford University Press, 2003) at 119.

126 Law No 19.374, Diario Oficial [Official Journal] (3 February 1995), available at: http://www.anfitrion.cl/actualidad/20ulle/19374.html [last accessed 23 November 2011].

facilitated the retirement of sitting justices over age 75 years.[127] Accordingly, 11 new members of the Court were appointed in 1998.[128] Five of those were non-judicial lawyers, marking a significant break from the 'closed, autonomous bureaucracy'[129] of Chile's established judiciary.

Additional judicial and legal reforms arguably have had minimal bearing on accountability case law. For example, a dramatic change in the Chilean criminal justice process was set in motion in the late 1990s and rolled out through 2005[130]—including a shift to adversarial penal procedure, the establishment of Public Prosecutor and Public Defender's offices, and reform of the penal code. But cases filed under the old system were not transferred to the new system, and the timing of the reforms limited the effect on past cases.[131] Indeed, penal reform did not directly impact on any of the cases covered here. Similarly, constitutional amendments affecting the Constitutional Tribunal have not resulted in that institution weighing in on accountability issues. A quasi-judicial body which had existed under the Allende administration, the Constitutional Tribunal was revived by the dictatorship in the 1980 Constitution.[132] Those amendments gave the Tribunal power to review the constitutionality of proposed legislation and government decrees.[133] It was not until 2005 that the Tribunal's power was expanded to include jurisdiction

127 Law No 19.541, Official Journal (22 December 1997) (modifying in relevant part Article 75, 1980 Constitution), available at: http://natlaw.com/interam/ar/ga/st/starga51.htm [last accessed 23 November 2011].

128 Hilbink, supra n 1 at 187.

129 Ibid. at 214. Dezalay and Garth describe the Chilean judiciary as traditionally 'part of an extended familial network' traceable to the old oligarchy: see *The Internationalization of Palace Wars: Lawyers, Economists and the Contest to Transform Latin American States* (Chicago: University of Chicago Press, 2002) at 223.

130 See Blanco, Hutt and Rojas, 'Reform to the Criminal Justice System in Chile: Evaluation and Challenges' (2004) 2 *Loyola University Chicago International Law Review* 253; and Riego, 'Introducción de Procedimientos Orales en Chile' [Introduction to Oral Proceedings in Chile] (Center for Strategic and International Studies, 2006) at 1–9, available at: http://www.csis.org/media/csis/events/060607judicialriego.pdf [last accessed 23 November 2011].

131 Blanco, supra n 130 at 260. The reforms were implemented in five stages beginning in two regions in 2000, with the final stage initiated in the Santiago metropolitan area (home to approximately one-third of Chile's population) in 2005: see Riego, supra n 130 at 5.

132 Article 81. The Constitutional Tribunal was comprised of seven members who served eight-year terms. Three Supreme Court judges were elected to the panel by that court and one lawyer was appointed by the President, two by the National Security Council (an entity controlled by the junta during the dictatorship and dominated by the military into the transition) and one by the Senate (prior to the transition, by the junta). See Article 81 1980 Constitution and transitory provisions 9, 21(b) and 25.

133 Article 82. Paradoxically, despite the prevalence of military appointees on its panel during the dictatorship, the Constitutional Tribunal found against the regime in a ruling that was instrumental in the fair running of the 1988 plebiscite on Pinochet's presidency and the resultant election of a democratic government in 1989. Hilbink, 'Agents of Anti-Politics: Courts in Pinochet's Chile', in Ginsburg and Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge: Cambridge University Press, 2008) at 111–2; and Barros, *Constitutionalism and Dictatorship: Pinochet, the Junta and the 1980 Constitution* (Cambridge: Cambridge University Press, 2002) at 257.

to review the constitutionality of existing laws as applied in individual cases,[134] previously the purview of the Supreme Court. This and other reforms[135] are set to alter the juridical/political dynamic in coming years,[136] but the Tribunal has not considered the constitutionality of the Amnesty Law.

In institutional and normative terms, Chile has the potential to join the global trend of judicialisation, most notably as a result of the re-invigoration of the Constitutional Tribunal[137] and ratification and application of international human rights law. (Scholars have identified a shift toward judicialisation of politics, in which courts have become 'powerful institutional actors or policy-makers' as a result of the establishment of new or stronger constitutions, expanded use of judicial review, and/or incorporation of international human rights law.[138]) Judicial reform during the period of transition did not, however, translate into a significant policy-making role by the traditional judiciary or members of the Constitutional Court. In 2005, Couso documented a low level of judicialisation in Chile, concluding that constitutional adjudication signified 'a "rights revolution" that never happened'.[139] The Constitutional Tribunal, considered key to the consolidation of democracy, failed to increase protection of human rights or judicial control over policymaking, and the Supreme Court's record was one of deference to the executive.[140] Recent decision-making by the Constitutional Tribunal indicates a shift is underway. According to Couso and Hilbink, its policy role increased dramatically in 2008, which they attribute in part to institutional reforms as well as changes to the composition

134 Article 93, 1980 Constitution (including 2005 reforms amending former Article 82; Law No 20.050, Official Journal (18 August 2005), available at: http://www.anfitrion.cl/actualidad/20ulle/20050.html [last accessed 23 November 2011]).

135 The 2005 reforms also increased the composition of the Tribunal to 10 members—three elected by the Supreme Court, three by the President and four by Congress—and their tenure to nine years and prohibited extracurricular legal and judicial activity so that there are no longer part-time members. See Article 92, 1980 Constitution.

136 Hammergren contends, however, that restricted access to constitutional tribunals in Chile and other Latin American countries limits conflict between those tribunals and supreme courts: see Hammergren, *Envisioning Reform: Improving Judicial Performance in Latin America* (University Park: Pennsylvania University Press, 2007) at 186.

137 Montes and Vial, *The Role of Constitution-Building Processes in Democratization* (Stockholm: International Institute for Democracy and Electoral Assistance, 2005) at 29, available at: http://www.idea.int/cbp/upload/CBP-Chile.pdf [last accessed 23 November 2011] (finding that Chile's political structure would constitute an acceptable model incorporating 'constitutional justice similar in its composition to the European model' at least on paper, assuming approval of the 2005 constitutional reforms).

138 See Shapiro and Stone, 'The New Constitutional Politics of Europe' (1994) 26 *Comparative Political Studies* 197; Tate and Vallinder (eds), *The Global Expansion of Political Power* (New York: New York University Press, 1995); and Shapiro and Stone Sweet, *On Law, Politics and Judicialization* (Oxford: Oxford University Press, 2002).

139 Couso, supra n 11 at 123. See also Couso, 'The Politics of Judicial Review in Chile in the Era of Democratic Transition, 1990-2002' (2003) 10 *Democratization* 70.

140 Couso, supra n 11. See also Hilbink, supra n 1.

of the Tribunal.[141] Interestingly, the authors discount the impact that compositional change to the Supreme Court has had on a process of judicialisation that may be developing in the ordinary courts, instead attributing it to modifications that have affected lower-court judges (in relation to training and salary, criminal procedure and their ability to raise constitutional issues before the Constitutional Tribunal).[142] In effect, activism has been identified in the Constitutional Tribunal and lower courts,[143] both of which are now less subject to direct and indirect Supreme Court control. A new intellectual environment that encourages judicial activism and development of constitutional law, particularly in the realm of rights protection, is also an influence on all courts.[144] This ideological shift may have affected the Supreme Court's Phase III jurisprudence discussed here, even if the institutional reform that Couso and Hilbink identify did not. Even so, it must be emphasised that the wider picture of Supreme Court conservatism places Phase III Amnesty Law jurisprudence in sharp relief, representing a counter-trend in rights protection.

B. Political Influences on Judicial Decision-making

Given the limited impact of reform projects on accountability case law, studies of judicial actors are particularly resonant in the Chilean context. Hilbink argues that the judiciary maintained passivity during the post-dictatorship era due to historic institutional norms;[145] in a study that covers case law up to 2000, she attributes shifts in Amnesty Law jurisprudence to the personnel changes in 1997 and 1998 and transnational pressure.[146] Comparing accountability case law to that related to post-authoritarian rights issues, Hilbink finds that, in the latter cases, the judiciary either neglected to apply constitutional analyses or was as likely to limit constitutionalist principles as to uphold them.[147] Accountability case law adhered to dominant jurisprudential trends during Phase I and began to diverge from the Court's conservative tendency in Phase II. (It is clear that Phase III case law, not considered in Hilbink's text, continued this trend.) Jurisprudential change has also been attributed to judicial ideology. In a study based on interviews of Chilean

141 Couso and Hilbink, 'From Quietism to Incipient Activism: The Institutional and Ideological Roots of Rights Adjudication in Chile', in Helmke and Ríos-Figueroa (eds), *Courts in Latin America* (Cambridge: Cambridge University Press, 2011) at 110.
142 Ibid. at 107–10.
143 Ibid. at 109 and 110.
144 Couso, supra n 8 at 149.
145 See, for example, supra n 23 at 208.
146 Ibid. at 198 and 208.
147 Ibid. at 203.

judges at all levels, Huneeus argues that a significant judicial motivator in Pinochet-era cases was the attempt to atone for judicial complicity in human rights abuses during the dictatorship.[148] The analysis seeks to explain the surge in prosecutions by lower courts rather than Supreme Court activity, contending that increased public scrutiny of these cases provided an opportunity in which Supreme Court power over lower courts was checked.[149] Collins places emphasis on the role of human rights advocates, lawyers, and victims in initiating and strategically pursuing claims, although she acknowledges that the shift in accountability activity should be attributed to a combination of factors including gradual democratisation and judicial change.[150] Direct access of legal representatives to magistrates facilitated investigations; legal and political strategies of advocates promoted results.[151]

These studies address institutional custom, judicial culture and the conduct of private actors affecting judicial decision-making in Chile during the transitional and post-transitional periods. More narrowly, they help to explain the shift in accountability jurisprudence identified in Section 2 of this article and why results in these cases differed from those in non-accountability case law. In sum, modifications to the composition of the Supreme Court and its specialisation into chambers provided an opportunity for change which was taken up—albeit inconsistently—in response to ongoing demands by victims and relatives and internal and external pressure.

The influence of the international *Pinochet* case—directly on the courts and indirectly by way of the Chilean public and international actors—may not be quantifiable but pervades the Chilean human rights story from the late 1990s. The details regarding Pinochet's return to Chile and efforts to prosecute him have been well documented.[152] It is worth emphasising that Phase II case law demonstrates a process of change in human rights jurisprudence in Chile prior to Pinochet's arrest in London. That process gained momentum during his detention from 1998 to 2000 and accelerated a number of years after his release. The timing and degree of change in Phase III case law can be most readily understood when viewed alongside domestic and international political events which include those involving Pinochet.

In effect, in the 2000s—more than 10 years after the start of the transition—the political consequences of sustaining claims against past human rights violators had receded and the risks of judicial apathy had increased for several reasons. First, accountability issues were no longer as politically charged as they had been in the 1990s. Public perception about the dictatorship had changed. Both Pinochet's detention and claims against the Pinochet

148 Huneeus, supra n 4 at 114–24.
149 Ibid. at 105 and 111.
150 See supra n 5 at 83-4.
151 Ibid. at fn 7 and 76–8.
152 See, for example, Roht-Arriaza, supra n 1; and Burbach, supra n 1.

family for financial crimes (beginning in 2004) had diminished his loyal support base in the political right. The military acknowledged the policy of disappearing opponents of the regime in early 2001, former officers had confessed (in court or through the media) for egregious crimes, and in 2003 President Lagos issued a formal apology for torture and other abuses. As a result, even supporters of the dictatorship no longer denied that violations had taken place. The risk of a military backlash against judicial decision-making was gone (and dozens of generals had retired in the late 1990s[153]) but conversely public interest in justice for past crimes had lessened.[154] Although the overall legacy of the dictatorship was still socially divisive in Chile, claims regarding contemporary rights abuses against the democratic governments were arguably more controversial than past cases.

Secondly, the judiciary's political position was propitious to divergence from past conservatism in accountability case law. The formal political power of the military had been reduced when Pinochet's term as Commander in Chief ended in 1998,[155] and judicial reform (from the late 1990s through 2005) encouraged judicial autonomy alongside an emerging legal culture that favoured the recognition of constitutional rights.[156] These changes did not translate into greater rights protection by the Supreme Court in a general sense, but, in combination with an unusual form of pressure from the government, it became more difficult for the Supreme Court to sustain use of the Amnesty Law in the face of ongoing claims by private parties. The commitment of the government to results in accountability case law can be questioned,[157] but its uniform message on the global stage was to challenge impunity and promote the use of domestic courts. (In addition, at the domestic level, from the late 1990s the Ministerio Público[158] rejected application of the Amnesty Law and supported continued investigation of cases.[159]) The Chilean government's position before the Inter-American bodies provides an example. It argued that it could not revoke the Amnesty Law given the constitutionally based legislative process and that it was obligated to protect judicial independence even where, as in the *Insunza* case, it disagreed with the Supreme Court's

153 Requa, supra n 1 at 91.

154 Collins, supra n 5 at 75, fn 38 (citing poll data compiled in Huneeus, *Chile, Un País Dividido* [*Chile: A Country Divided*] (Santiago: Catalonia, 2003)).

155 Requa, supra n 1 at 91.

156 Couso, supra n 8 at 149.

157 There have been several indications of successive governments' reticence to promote accountability. For example, the Frei and Lagos administrations made attempts to restrict prosecutions for human rights abuses, and the Bachelet administration nominated pro-impunity judges to the Supreme Court. Muted efforts to repeal the Amnesty Law were never sustained.

158 The Office of the Public Prosecutor.

159 See, for example, *Contreras Maluje*, supra n 46 at para 13 (majority). It does not appear that the current conservative administration has diverged from this policy. See 'Gobierno apelará a dictamen de la Suprema que rechazó reabrir caso Soria' ['Government to appeal Supreme Court ruling that rejected reopening of the *Soria* case'], *EFE*, 31 March 2010; and 'Chile president rules out pardon for military abuses', *BBC*, 25 July 2010.

decision. Yet it declared the Amnesty Law to be legally void and, as the transition endured, became more forthright in its condemnation of military abuses. Similarly, successive governments opposed the Amnesty Law in various international fora.[160] Most famously, the prospect of domestic trials was invoked by the government in attempts to secure Pinochet's return from the UK. This internationally mediated pressure on the judiciary was augmented by the censure of the Chilean judiciary by global actors and institutions.[161] Reproach of the Supreme Court by the Inter-American bodies culminated in the Inter-American Court's 2006 finding[162] that the Chilean state, including the judiciary, continued to be in contravention of the ACHR.[163]

The Supreme Court's Phase II doctrine fell short of the standards advocated by the government and international bodies. Moreover, the Court's adherence to a conservative conception of the role of the judiciary (as one that applies rather than interprets law) was incongruous with international norms with respect to the prosecution of gross human rights violations. The attention drawn to Chilean justice claims during Pinochet's detention, and the government's promises that the Chilean courts were able to decide the cases fairly, subjected accountability jurisprudence in particular to domestic and international scrutiny. In consequence, the Supreme Court was encouraged to take a progressive stance in these high-profile cases.

In its Phase III case law, the Supreme Court went beyond what was legally necessary to decide the claims in favour of victims and their families, invoking an array of international authorities and norms. Although not easy to conclusively determine, international pressure provides a plausible explanation for the Court's new approach. After the Amnesty Law was held contrary to international law by the Inter-American Court in *Almonacid-Arellano*[164] and then-President Michelle Bachelet vowed to repeal the law, the president of the Chilean Supreme Court stated publicly that Inter-American Court judgments are not binding on domestic courts (and it was not possible to re-open

160 According to the Lagos administration, '[s]ince March 1990, the democratic Governments have considered the Amnesty Decree-Law to be unlawful'. Human Rights Committee, Consideration of Reports submitted by States Parties under Article 40 of the Covenant: Fifth Periodic Report: Chile, 5 July 2006, CCPR/C/CHL/5 at para 1. See also, in respect to the Bachelet administration, Gallardo, 'Chile Leader Visits Site of Her Torture', *The Associated Press*, 14 October 2006.

161 Sikkink considers that dynamics such as these create political opportunities, whereby efforts of activists can have a greater impact on domestic institutions in relation to (for example) the use of international human rights law. See Sikkink, 'The Transnational Dimension of the Judicialization of Politics in Latin America', in Sieder et al., supra n 11 at 263–89.

162 *Almonacid-Arellano v Chile*, supra n 112.

163 Supra n 68.

164 *Almonacid-Arellano v Chile*, supra n 112.

adjudicated cases).[165] Nonetheless, two months after the decision, the Supreme Court decided *Villa Grimaldi*, which went beyond the early Phase III cases in terms of rights protection. That case, as well as *Tomás Rojas* five months later, was more closely aligned to Inter-American Court jurisprudence on amnesty laws and past human rights violations than any previous Supreme Court case even though *Almonacid* itself was not directly followed.

C. Judicial Autonomy

Chile's historically civil law system is undergoing reform in a number of realms, with the introduction (for example) of adversarial features to criminal procedure and the increasing recognition that courts should not merely apply but interpret legislation.[166] Chilean legal culture may be experiencing change, with a new acceptance of judicial independence, but the narrowly drawn decision-making in accountability case law indicates that the Supreme Court was not attempting to use the docket to broaden its powers more generally. Instead, international and domestic pressure in regard to past human rights violations had an impact on a court that—despite personnel changes—remains conservative. Notwithstanding the reactive and issue-specific analysis that was employed in Phase III case law, the Supreme Court asserted its authority to determine the position and content of human rights law in the Chilean system. The jurisprudence also demonstrated the importance of judge-made law in the predominantly civil system[167] and *jurisprudence constante*, whereby decisions are not binding on subsequent courts but have 'mature[d] into a prevailing line of precedents'.[168] The Court referred to its own doctrine on Article 5 of the Constitution as precedent, developed rules related to hierarchy of law, and invoked a wide variety of authorities to find the Amnesty Law invalid. The case law therefore aligns with broader legal trends if not the Supreme Court's jurisprudence on other matters.

Section 2 of this article identified gaps and contradictions in the jurisprudence, but nonetheless the case law demonstrates significant judicial autonomy to resolve human rights issues. Interestingly, the Court relied on not only its constitutional authority to decide the claims but also more general powers

165 'Suprema no reabrirá caso amnistiado pese a fallo de la Corte Interamericana' ['Supreme Court will not reopen amnestied case despite Inter-American Court judgment'], *La Nación*, 17 October 2006.

166 Blanco, supra n 130; Riego, supra n 130; and Couso, supra n 8. On the exportation of US and German legal cultures to Chile, see Cooper, 'Competing Legal Cultures and Legal Reform: The Battle of Chile' (2008) 29 *Michigan Journal of International Law* 501.

167 On judicial lawmaking in civil law systems, see Vranken, *Fundamentals of European Civil Law* (Sydney: The Federation Press, 1997) at 62–6; and Merryman and Pérez-Perdomo, *The Civil Law Tradition*, 3rd edn (Stanford: Stanford University Press, 2007) ch 7.

168 Fon, Parisi and Depoorter, 'Litigation, Judicial Path-Dependence and Legal Change' (2005) *European Journal of Law and Economics* 43.

that transcended the 1980 Constitution. Protection of rights, it seems, is a duty of the Court rooted in the country's twentieth century constitutional history and values upon which the political system is based. In Phase III case law, the Supreme Court resolved Article 5's ambiguity in favour of the primacy of international law. But its fact-specific analysis, identifying the rights at issue as 'essential', allows the Court to decline to apply international law in future matters, maintaining a zone of discretion[169] to determine the relevance of Article 5. In conjunction with its power to determine the content of rights and conflicts of law, the Supreme Court can readily diverge from doctrine established in accountability case law. Still, the jurisprudence supports the rights-based approach that many lower courts have taken and provides an invitation to human rights advocates to pursue claims on other issues.

4. Conclusion

This article has explored the sea change in Chilean Supreme Court accountability jurisprudence in recent years, from routine recognition of the Amnesty Law in the first decade of democracy to its rejection in the mid-2000s. During Phase II, the Court began to evade the law but declined to conclusively alter established doctrine, which continued to lend legitimacy to dictatorship-era norms. Phase III represented a watershed in many respects: in *Sandoval*, the Supreme Court officially acknowledged abuses committed by the military regime; in *Arón*, *Villa Grimaldi* and *Tomás Rojas* the Court renounced use of amnesty and statutes of limitations for international crimes and presented a fundamentally different view of the internal legal order, prioritising human rights law. The Court considered that judicial obligations to guarantee individual rights are rooted in the Constitution, international law and principles that transcend positive law. The case law could be viewed as politically assertive except that domestic and international pressure on the Court facilitated the dramatic shift. It has been contended in this article, however, that accountability jurisprudence remains unstable. The manner in which constitutional doctrine was developed maximises the Court's discretion and provides significant opportunity for the invocation of international law by advocates and other courts but also the anticipation of continued inconsistent results in rights cases. The groundwork has been laid for the Court to diverge from its traditional deferential role in the political system, yet social and political factors seem set to remain a significant influence on decision-making.

169 The phrase is from Krisch, used in the context of the pluralism of the European human rights regime. See Krisch, 'The Open Architecture of European Human Rights Law' (2008) 71 *Modern Law Review* 183 at 215.

A final point can be made about the failure of successive governments to ensure justice for victims of human rights abuses. The point is not that government should have intervened in individual court proceedings, which would violate separation of powers principles, but that the lack of legislative and judicial reform on human rights matters impeded the ability of courts to resolve the issues. Accountability claims were not included in the political settlement that ended the dictatorship, an understandable outcome given fear that the peace process could be easily derailed. Retributive approaches were not encouraged in the early years of the transition in consideration of the military's enduring strength.[170] But nor has there been a focused political effort to deal with such legacy issues in the years since, in contrast to Chile's claims internationally. Constitutional and judicial reform (which had minimum impact on past cases, other than to alter the composition of the Supreme Court) was distinguished from initiatives to address abuses of the dictatorship, which concentrated on truth processes and reparations programmes.[171] These schemes did not make determinations of responsibility or provide restoration in individual cases other than to provide financial compensation to victims and their families. Arguably, the governments benefitted from the ambiguity and distance provided by struggling court processes, which allowed them to avoid controversial policymaking in the name of judicial independence.

Political leaders have avoided specific policy proposals regarding human rights abuses. The constancy of certain legal rules at the centre of developing jurisprudence is striking and underscores the extent to which change stemmed from the courts. Most notably, the dictator's Amnesty Law has not been repealed by Chile's Congress. Laws applicable in regular criminal cases (related to statutes of limitations, non-retrospectivity of law, double jeopardy and transfer and suspension of cases, for example) were not altered to address—or even conversely prohibit application to—gross human rights violations. The judiciary has been compelled to adapt ordinary criminal procedure to now decades-old cases of systematic abuse by state agents that raise distinct legal issues. Sentencing law is another area where legislative activity would have been appropriate; inconsistent decision-making continues to be an issue. The position of international law in the constitutional system also remains ambiguous, notwithstanding the Supreme Court's interpretation of Article 5 in Phase III case law. This is ripe for legislative resolution, through ordinary law

170 Portales, *Chile: Una Democracia Tutelada* [*Chile: A Protected Democracy*] (Santiago: Editorial Sudamericana Chilena, 2000).

171 Truth processes include the Commission on Truth and Reconciliation (established in May 1990; report issued February 1991); the National Corporation for Reparation and Reconciliation (established in January 1992 to oversee the reparations programme and continue investigations of the CTR); Mesa de Diálogo [Roundtable Discussions] (established in June 2000 to determine the whereabouts and information related to disappeared persons); and the National Commission on Political Imprisonment and Torture (established in August 2003; reports issued in November 2004 and June 2005).

or constitutional amendment. Finally, in the absence of binding precedent, legislation could have been introduced to ensure consistent interpretation of fundamental human rights law. Any change to precedential rules arguably should be made by legislators, and indeed the judiciary has deemed it inappropriate to act on the issue. (The Supreme Court commissioned an internal study which found that its decisions were not legally binding in subsequent cases because (i) the civil code stipulates that decisions only have effect in the immediate case and (ii) precedent would counter judicial independence.[172]) Although the lack of binding precedent is not problematic in itself,[173] it was a significant barrier to consolidation of the anti-impunity surge in Chilean case law, resulting in contradictory conclusions in similarly situated cases and prolonged appeals. In sum, the slow pace of change and inconsistency in accountability jurisprudence reflects these obstacles as well as judicial ideology. Political leaders failed to provide courts with the legal tools to comprehensively address egregious crimes of the past.

The reticence of politicians to act conclusively to promote (or alternatively prevent) human rights trials impeded and prolonged court processes and partially accounts for variable and creative judicial doctrine. This argument is a reminder that the role of executives and legislatures, with respect to retributive accountability as part of 'post-transitional justice', should not be discounted.[174] In Chile, during and after the transition to democracy, private actors attempted to resolve justice issues through court processes; they have been successful recently—despite challenges that accompany the passage of time—because the political climate is less hostile to such claims. But consistent and comprehensive accountability requires sustained political engagement as well, which was lacking in Chile and has not been taken up in the recent period. Arguably, governments and legislatures should play a key role in negotiations related to human rights violations of previous regimes; in Chile at this late date, politicians should act to address irregularities in the application of human rights law and in sentencing matters, however unpopular the topic. Legal reform related to the domestic position of international law would promote consistency between past and contemporary rights issues and improve protection of rights more generally in Chile.

172 See Valenzuela, supra n 27.

173 See Merryman, supra n 168.

174 Recent scholarship has identified the theory and practice of post-transitional justice and conceptualised the role of the state as diminished—in respect to dealing with past human rights abuses—when compared to the period of transition. See, for example, Collins, supra n 4 at 34–5; and Skaar, supra n 4 at ch 2.